IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

GREEN GROUP HOLDINGS, LLC, and HOWLING COYOTE, LLC, **Plaintiffs,**	)	
v.	)	**CIVIL ACTION NO. 16-00145-CG-N**
MARY B. SCHAEFFER, ELLIS B. LONG, BENJAMIN EATON, and ESTHER CALHOUN, individually and as members and officers of BLACK BELT CITIZENS FIGHTING FOR HEALTH AND JUSTICE, **Defendants.**	)	

REPORT AND RECOMMENDATIONS

Unhappy about alleged "false and malicious" statements made by members of Black Belt Citizens Fighting for Health and Justice (hereinafter, "Black Belt") regarding the operation of their landfill, the Plaintiffs filed suit against certain Black Belt members and officers for libel and slander, demanding $30 million in damages. For a variety of reasons, including the First Amendment of the United States Constitution, the Defendants assert that the Plaintiffs have failed to state a claim on which relief can be granted and that this action is due to be dismissed under Federal Rule of Civil Procedure 12(b)(6). (Docs. 15, 16).

The Plaintiffs have timely filed a response (Doc. 32) in opposition to the motion to dismiss, and the Defendants have timely filed a reply (Doc. 34) to the response. The motion is now under submission and is ripe for disposition. (*See* Doc. 29). Under S.D. Ala. GenLR 72(b), the motion to dismiss has been referred to the undersigned Magistrate Judge for entry of a recommendation as to the appropriate

disposition, in accordance with 28 U.S.C. § 636(b)(1)(B)-(C), Federal Rule of Civil Procedure 72(b)(1), and S.D. Ala. GenLR 72(a)(2)(S). Upon consideration, the undersigned **RECOMMENDS** that the Defendants' Motion to Dismiss (Doc. 15) be **GRANTED** but that the Plaintiffs be **GRANTED** limited leave to file an amended complaint.[1]

I. Standard of Review

In deciding a motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted," the Court must construe the complaint in the light most favorable to the Plaintiffs, "accepting all well-pleaded facts that are alleged therein to be true." *E.g.*, *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013). "Under Rule 10(c) Federal Rules of Civil Procedure, [copies of written instruments that are exhibits to a pleading] are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion." *Solis-Ramirez v. U.S. Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) (per curiam). "Fed. R. Civ. P. 8(a)(2) requires that a pleading contain 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (quotation omitted). " 'While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the

[1] The Defendants have requested oral argument on their motion. However, the undersigned finds oral argument to be unnecessary prior to issuance of this recommendation. *See* Fed. R. Civ. P. 78(b); S.D. Ala. CivLR 7(h).

elements of a cause of action will not do.' " *Id.* at 1289 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)). A complaint's " '[f]actual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact).' " *Id.* (quoting *Twombly*, 550 U.S. at 555). "[T]o survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly*, 550 U.S. at 570). While this "plausibility standard is not akin to a 'probability requirement' at the pleading stage, … the standard 'calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the claim." *Id.* (quoting *Twombly*, 550 U.S. at 556).

Moreover, " 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.' " *Id.* at 1290 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Under the plausibility standard, " 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show [n]"—"that the pleader is entitled to relief." ' " *Id.* (quoting *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2))). *Iqbal* "suggested that courts considering motions to dismiss adopt a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' " *Id.* (quoting *Iqbal*, 556

U.S. at 679). "Importantly, … courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Id.* (quoting *Iqbal*, 556 U.S. at 679 (quoting *Twombly,* 550 U.S. at 567)).

"[G]enerally, the existence of an affirmative defense will not support a rule 12(b)(6) motion to dismiss for failure to state a claim. A district court, however, may dismiss a complaint on a rule 12(b)(6) motion when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint." *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) (quotation omitted)).

II. Well-Pleaded Factual Allegations and Causes of Action

Per the First Amended Complaint (Doc. 10),[2] Plaintiff Green Group Holdings, LLC established Howling Coyote Holdings, LLC for the purpose of owning and operating the Arrowhead Landfill in Perry County, Alabama (hereinafter, "the Landfill"), which Howling Coyote purchased on December 21, 2011, under an

[2] The First Amended Complaint (Doc. 10) is the operative pleading in this action. *See, e.g. Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) (per curiam) ("As a general matter, an amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary." (quotation omitted)). The First Amended Complaint was filed in response to the undersigned's order for the Plaintiffs to address certain deficiencies in their allegations supporting subject matter jurisdiction. (Doc. 8).

The First Amended Complaint alleges diversity under 28 U.S.C. § 1332(a)(1) as the sole basis for jurisdiction. Given that the Plaintiffs have demanded millions of dollars in damages, § 1332(a)'s requisite amount in controversy is satisfied. The Plaintiffs have also alleged sufficient facts demonstrating that complete diversity of citizenship exists. The four individual Defendants are all alleged to be citizens of Alabama, and none of the members of the two Plaintiff limited liability companies is alleged to be a citizen of Alabama. The Defendants have not challenged subject matter jurisdiction, and the undersigned finds no reason to question the Plaintiffs' allegations. Accordingly, the undersigned finds that the Court has subject matter jurisdiction over the Plaintiffs' case under § 1332(a)(1).

approved bankruptcy sale. Beginning July 4, 2009, the previous owners of the Landfill had begun accepting shipments of waste material, consisting primarily of coal ash, released from the Tennessee Valley Authority ("TVA")'s Kingston Fossil Plant following a dike failure on December 22, 2008. The coal ash was received as part of an agreed disposal plan between the TVA and the U.S. Environmental Protection Agency ("EPA"). As part of that plan, the TVA found, and the EPA concurred, as follows:

> The Arrowhead Landfill is a state-of-the-art, Subtitle D Class I facility. The composite liner system consists of 2 feet of 1 x 10-7 cm/sec compacted clay, a 60 mil high density polyethylene geomembrane liner, and a 2 foot thick drainage layer with a leachate collection system and protective cover. The site geology consists of the Selma Group chalks which ranges from 500 to 570 feet thick across the site, with a permeability less than 1 x 10-8 cm/sec. The uppermost groundwater aquifer is located beneath this layer.

The waste material was loaded into "burrito bag"-lined gondola rail cars in Kingston and shipped to the Landfill by rail, unloaded and transported by truck from the railhead to the disposal site. The waste material maintained a moisture content of approximately 25% while in the rail cars and a moisture content of approximately 23% while exposed in the disposal cell. The coal ash did not become airborne at anytime after it arrived at the Landfill's rail yard. The overwhelming majority of the waste material from Kingston was disposed of in disposal cells that have been closed in accord with the rules and regulations promulgated by the Alabama Department of Environmental Management ("ADEM"), which is primarily responsible for the issuance of the permits necessary to operate the Landfill and for monitoring the Landfill's compliance with the terms of those permits. ADEM has

issued four permits for the Landfill over time, with some being revised and/or renewed. Since the Landfill opened on October 15, 2007, it has received no notices of violation of any of its permits from ADEM or EPA, despite having been inspected numerous times by each.

A. Count I – Libel

Black Belt publishes and maintains a publicly accessible website (http://blackbeltcitizens.wix.com/blackbeltcitizens). The website declares that one of the organization's goals is to "Get rid of the Arrowhead Landfill" and states the following description of the Landfill under its "Projects" tab:

> Arrowhead Landfill, located on south Perry County Road 1 near Uniontown, Alabama, **poses a serious health and environmental threat** to our area. **Built on an unsuitable site** over our aquifer, it now contains almost 4 million tons of toxic coal ash from the Kingston TN spill. Stormwater runoff and **deliberate discharges from the landfill reveal high levels of arsenic** which, along with **toxic dust and noxious odors, are impacting residents**, their livestock, and the garden produce on which they depend.

(Emphasis added by Plaintiffs).

Black Belt also publishes and maintains a publicly accessible Facebook page (https://www.facebook.com/Black-Belt-Citizens-753236721412415/), on which the following statements have been posted:

> October 23, 2015: Arrowhead Landfill and its owners, **Green Group Holdings, neglects laws, peoples' rights, and our culture. First, corruption and unlawful actions get the landfill here.** Then, 4 million tons of coal ash and garbage from 33 states. Now, Arrowhead landfill and **Green Group Holdings are trespassing and desecrating a black cemetery.** Black lives matter! Black ancestors matter!
>
> November 2, 2015: Coal ash landfills, like **Arrowhead Landfill, continue to leak toxins into rivers, streams, and groundwater**,

potentially affecting the quality of drinking water. This toxic waste effects everyone, please watch this short film about the problems at Arrowhead.

November 13, 2015: Black Belt Citizens demand no more coal ash in Uniontown! Black Belt Citizens demand ADEM and EPA enforce their laws to prevent further discrimination against the community. **The landfill is poisoning our homes and destroying our Black cementery (sic)**. THIS IS ENVIRONMENTAL INJUSTICE! Where's our justice?

November 13, 2015: Uniontown residents continue to be upset over the actions of the Arrowhead Landfill, over the past 3 days there has been another unpermitted (illegal) discharge leaving **Green Group Holdings toxic landfill**. This has been occurring for years and ADEM has never enforced their permit limits to stop this problem. The majority of the **residents around the landfill are worried about their** water, air, property values, **families' health, and the nearby sacred cemetery that is also being desecrated by the landfill**.

November 20, 2015: Pictures of the New Hope Cemetery, neighbor of Arrowhead Landfill. The photos are of possible trespass and recent bulldozing done by the landfill, some of the graves are unable to be located, family members are upset over their **sacred space being violated, damaged, & desecrated**. Arrowhead Landfill is on the site of an older plantation. The New Hope Cemetery is the final resting place of former workers, indentured servants, and slaves of the plantation. Recent actions by the landfill and improper enforcement from the state constantly remind Uniontown's residents of their past life full of violence, hate, & oppression.

December 5, 2015: "We are tired of being taken advantage of in this community," said Uniontown resident Benjamin Eaton, who is a member of the group Black Belt Citizens Fighting for Health and Justice. "The living around here can't rest because of the **toxic material** from the coal ash **leaking into creeks and contaminating the environment**, and the deceased can't rest because of **desecration of their resting place**."
January 11, 2016: **Multiple pollution sources impact residents including Arrowhead Landfill** which stores over 4 million tons of toxic coal ash. This **landfill is experiencing unpermitted amounts of water runoff leaving its site and entering neighboring property.** Also, the landfill may have committed **illegal trespass & desecration of an adjacent Black cemetery**. The owners of this landfill, **Green Group Holdings, own and operate many extreme landfills around the US**.

…

This event is created to unite citizens across Perry County and Uniontown, Alabama's Black Belt, and the Southeast US to accomplish the following:

…

- Identify communities' needs against environmental injustices including **illegal pollution**, coal ash, corporate interests for **toxic landfills**, and **"extreme energy waste sites"**

January 14, 2016: Join us this Saturday in Uniontown for Building Bridges for Justice as we focus on the **toxic, 4 million tons of coal ash** sitting in the Arrowhead Landfill. The **landfill's pollution problems are influencing the decrease of property values while increasing health concerns**. This extremely large landfill owned by Green Group Holdings has been reportedly **trespassing and desecrating a nearby Black Cemetery**. These impacts are very discriminatory and we feel our civil rights are being violated by environmental racism at all levels.

February 25, 2016: "Its a landfill, its a tall mountain of coal ash and it has affected us. **It affected our everyday life**. It really has done a lot to our freedom. **Its another impact of slavery.** ...Cause we are in a black residence, things change? And you can't walk outside. And **you can not breathe. I mean, you are in like prison**. I mean, its like **all your freedom is gone**. As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still matter and w**e all should have the right to clean air and clean water**. I want to see EPA do their job." Powerful words from our President Esther Calhoun.

March 1, 2016: The **toxic Arrowhead Landfill** continues to hurt/violate/oppress the community with the **desecration of the adjacent cemetery**, the **constant run-off of contaminated water**, the **bad odors and smells**, and the **depression of property value**.
Watch this small video by Black Belt Citizens member Timothy Black as he records run-off at **toxic Arrowhead**. Black Belt Citizens stand with all communities impacted by toxic coal ash and extreme energy wastes. We stand united with all communities suffering from oppressive and discriminatory policies and practices. We stand with all people who fight for health and justice.

(Emphasis added by Plaintiffs).

On November 19, 2015, and again on March 10, 2016, counsel for the Plaintiffs emailed letters to the Defendants demanding that they immediately delete the "false and defamatory" posts from their Facebook page, retract their prior posts as being false and misleading, and immediately cease and desist from making false, erroneous statements about Green Group and the Landfill.[3] The Defendants did not respond to the November 19, 2015 letter. Late in the afternoon of March 15, 2016, Defendant Mary B. Schaeffer sent an email, on behalf of herself and her sister, Defendant Ellis B. Long, acknowledging receipt of the March 10, 2016 letter and providing notice that the offending posts had been removed from the Black Belt Facebook page. Schaeffer further claimed that the posts were written and posted without the knowledge or approval of the officers of Black Belt and that a further response to the Plaintiffs' "requests" would be forthcoming from the Defendants or their unnamed attorneys.

On the early morning of March 16, 2016, counsel for the Plaintiffs sent a letter to the Defendants by e-mail which, *inter alia*, reminded the Defendants of the demand for a repudiation or retraction of their prior posts and extending the previously provided deadline for its publication to Friday March 18, 2016. On

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[3] *See* Ala. Code § 6-5-186 ("Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication unless (1) it shall be proved that the publication was made by the defendant with knowledge that the matter published was false, or with reckless disregard of whether it was false or not, and (2) **it shall be proved that five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter.**" (emphasis added)).

March 17, 2016, Schaeffer sent another email on behalf of herself and Long stating that a further response to the Plaintiffs letter would be forthcoming from the Defendants or their unnamed "counsel." On March 18, 2016, all four Defendants sent Plaintiffs' counsel "a letter of representation … promising a full response after meeting with those defendants 'early next week'." The "full response" was received on March 28, 2016, consisting of an "argumentative letter" that did not include the demanded repudiation or retraction of the offending Facebook posts. A final demand for retraction was sent on March 30, 2016, but was not responded to by the Defendants.

The Plaintiffs allege "that the Defendants published the above online material "knowing of its falsity and sensationalizing sting, with malice by intentional action or with reckless disregard for the truth, with an intent to disparage and demonize Plaintiffs and Arrowhead Landfill in the hope of achieving their goal of getting rid of Arrowhead Landfill … [B]y portraying Arrowhead Landfill as a facility that is a corrupt, intentional polluter of the Uniontown community that also desecrates cemeteries and is intentionally preying on that community to the extent that it calls to mind slavery times and false imprisonment, the Defendants have through the national and international publication of such sensational and defamatory (though false) allegations permanently injured and damaged the business and reputation of Plaintiffs." On this basis, Count I of the Amended Complaint alleges a claim of libel against the Defendants.

B. Count II – Slander

The Defendants also organized and publicized a "news conference" held in Uniontown, Alabama, on December 4, 2015, featuring the Alabama State Conference of the National Association for the Advancement of Colored People. Members of the press were present, including a reporter for al.com, who on December 5, 2015, published an online article about the event stating, in relevant part:

> "We are tired of being taken advantage of in this community," said Uniontown resident Benjamin Eaton, who is a member of the group Black Belt Citizens Fighting for Health and Justice. "The living around here can't rest because of the **toxic material** from the coal ash **leaking into creeks and contaminating the environment**, and the deceased can't rest because of **desecration of their resting place**."

(Doc. 10 at 13 (quoting "Cemetery Dispute the Latest Conflict Between Arrowhead Landfill, Uniontown Residents," Dennis Pillion, December 5, 2015, http://www.al.com/news/index.ssf/2015/12/arrowhead_landfill_uniontown_r.html (emphasis added by Plaintiffs))).

Additionally, Defendant Esther Calhoun appeared on the radio show "Uprising with Sonali" (originating in Southern California but available for listening worldwide on the show's website), making the following statements during that appearance:

> Its a landfill, its a tall mountain of coal ash and it has affected us. **It affected our everyday life.** It really has done a lot to our freedom. **Its another impact of slavery.** ... Cause we are in a black residence, things change? And you can't walk outside. And **you can not breathe. I mean, you are in like prison**. I mean, its like **all your freedom is gone.**

> As a black woman, our voices are not heard. EPA hasn't listened and ADEM has not listened. Whether you are white or black, rich or poor, it should still matter and **we all should have the right to clean air and clean water**. I want to see EPA do their job.

(Emphasis added by Plaintiffs).

The Plaintiffs allege that these "sensational," "false," and "defamatory" statements "have permanently injured and damaged the business and reputation of Plaintiffs." On this basis, Count II of the Amended Complaint alleges a claim of slander against the Defendants.

III. Analysis

Libel and slander are each a species of defamation under Alabama law.[4] *See First Indep. Baptist Church of Arab v. Southerland*, 373 So. 2d 647, 648 (Ala. 1979) ("Libel is commonly perceived as a defamation which springs from the publication of written or printed material."); *Casey v. McConnell*, 975 So. 2d 384, 390 (Ala. Civ. App. 2007) (stating that "slander is a branch" of defamation). Generally, to

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[4] "In a diversity action such as this one, a federal court must apply the choice-of-law principles of the state in which it sits." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016). "*Lex loci delicti* has been the rule in Alabama for almost 100 years. Under this principle, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred." *Ex parte U.S. Bank Nat. Ass'n*, 148 So. 3d 1060, 1069 (Ala. 2014) (citing *Fitts v. Minnesota Min. & Mfg. Co.*, 581 So. 2d 819, 820 (Ala. 1991)). "[T]he place of injury is in the state where the fact which created the right to sue occurs." *Id.* at 1070.

Per the allegations in the Amended Complaint, neither of the limited liability company Plaintiffs is based in Alabama (both were organized under Georgia law and have their principal places of business there). However, the Defendants' allegedly defamatory statements were published from Alabama and concern the Plaintiffs' Alabama business operations. Moreover, all parties have argued that Alabama law applies to the slander and libel claims at issue in their briefing. *Cf. Michel*, 816 F.3d at 695 ("Because no party has challenged the choice of New York libel law, all are deemed to have consented to its application." (quotation omitted)). Accordingly, the undersigned will apply Alabama law to the Plaintiffs' claims for purposes of the present motion.

establish a *prima facie* case of defamation under Alabama law, a plaintiff must show: [1] that the defendant was at least negligent [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod).[5] *Fed. Credit, Inc. v. Fuller*, 72 So. 3d 5, 9-10 (Ala. 2011). *Accord U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1293 n.22 (11th Cir. 2001).

A. Member Liability

The Defendants initially argue that the Amended Complaint fails to allege facts plausibly showing that either Schaeffer or Long, individually, published any oral defamatory statements, or that any of the Defendants, at least individually, actually published any of the online written defamatory statements. The Plaintiffs

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[5]

> There is a distinction between actions of libel predicated on written or printed malicious aspersions of character, and actions of slander resting on oral defamation. This distinction, however, is merely in respect to the question as to whether the imputed language or words are actionable per se.
>
> In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se. *While to constitute slander actionable per se, there must be an imputation of an indictable offense involving infamy or moral turpitude.*
>
> This distinction, however, does not deny the right to maintain an action for slander founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt, though it falls short of imputing the commission of such crime or misdemeanor. In such case the law pronounces the words actionable per quod only, and the plaintiff must allege and prove special damages as an element of the cause of action.

Liberty Nat. Life Ins. Co. v. Daugherty, 840 So. 2d 152, 157 (Ala. 2002) (quotations omitted). Here, the Defendants have not moved for dismissal of any claim for failure to allege special damages. Thus, the "*per se*/*per quod*" issue is not before the Court on the present motion.

attribute the online statements to the Defendants based on little more than the fact that they are officers and/or members of Black Belt and that they were the individuals who responded to the Plaintiffs' requests that the statements be deleted and retracted.[6]

In response, the Plaintiffs assert that the Defendants' mere status as officers and/or members of Black Belt can plausibly subject them to liability for defamatory statements published by other members. Noting, as they've alleged, that Black Belt is an "unincorporated association," the Plaintiffs assert that, "[s]ince unincorporated associations are treated in Alabama as partnerships, its members are jointly and severally liable for its liabilities incurred in the ordinary course of its business or in furtherance of its purpose." (Doc. 32 at 10). In support, they cite *Dinsmore v. J.H. Calvin Co.*, 108 So. 583 (Ala. 1926), in which the court held: "An unincorporated association **organized for business or profit** is in legal effect a mere partnership so far as the liability of its members to third persons is concerned; and accordingly each member is individually liable as a partner for a debt contracted by the association. As each partner represents his copartners, so each member of the association represents his comembers, and each is bound by the acts of the others in

[6] In addition to Schaeffer, Long, Eaton, and Calhoun, the Plaintiffs' initial Complaint listed a number of unnamed parties as additional Defendants in this action. (*See* Doc. 1 at 1). Before the Amended Complaint was filed, the Court ordered these unnamed parties stricken, under the general rule that fictitious-party pleading is not permitted in federal court. *See* (Doc. 7); *Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010) (per curiam). The Amended Complaint omits mention of these unnamed parties in its style or anywhere else, apart from a footnote carried over from the initial Complaint that references "the basis for the addition of fictitious party Defendants," *compare* (Doc. 1 at 7 n.7) *with* (Doc. 10 at 7 n.9). The undersigned does not construe the First Amended Complaint as asserting any claims against unnamed Defendants.

the common behalf." 108 So. at 584 (emphasis added) (quotation omitted). Alabama case law also recognizes that "an unincorporated association … may be liable in tort for the wrongful acts of its members when acting collectively in the prosecution of the business for which it is organized, and it is responsible for torts of its members or employees when encouraged in them, or if ratified thereafter. However, in the absence of authorization or ratification by its members, an association is not liable for intentional torts by a member or members." *Rothman v. Gamma Alpha Chapter of Pi Kappa Alpha Fraternity*, 599 So. 2d 9, 10 (Ala. 1992) (citation and quotation omitted). *See also Hunt v. Davis*, 387 So. 2d 209, 211 (Ala. Civ. App.) ("Agency must be shown, not being implied from the mere act of association, and only those members who authorize or ratify the transaction are liable."), *writ denied sub nom.*, *Ex parte Hunt*, 387 So. 2d 213 (Ala. 1980). Here, by refusing to remove or retract the alleged defamatory statements from the Black Belt website and Facebook page, the Defendants could plausibly be said to have ratified those statements, even if they themselves did not post them. Such ratification also plausibly extends to Eaton and Calhoun's oral defamatory statements, since those statements were quoted on the Black Belt Facebook page.

In reply, the Defendants contend that Black Belt is actually an "unincorporated nonprofit association" as defined in Ala. Code § 10A-17-1.02(2) (" 'Nonprofit association' means an unincorporated organization consisting of two or more members joined by mutual consent as an association for a stated common, nonprofit purpose."). "A person is not liable for a tortious act or omission for which

a nonprofit association is liable merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association." *Id.* § 10A-17-1.07(c).[7] Likewise, "[a] tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association." *Id.* § 10A-17-1.07(d).

In deciding the present Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded allegations in the Amended Complaint and draw all reasonable inferences therefrom in favor of the Plaintiffs. The Plaintiffs have alleged only that Black Belt is an "unincorporated association," not an unincorporated **nonprofit** association, and have offered some authority indicating that members of an unincorporated association can be liable for the actions of other members in certain circumstances. The Defendants have failed to offer any specific argument for why Black Belt should be considered an unincorporated nonprofit association – in particular, whether it has a valid "nonprofit purpose"[8] – instead

[7] " 'Member' means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association." Ala. Code § 10A-17-1.02(1).

[8] *See* Ala. Code § 10A-17-1.02(3) (" 'Nonprofit purpose' shall be any purpose for which a nonprofit corporation could be organized under the Alabama Nonprofit Corporation Act, as

simply assuming that the Court would accept their assertion at face value. However, it is not apparent from the face of the Amended Complaint that the Plaintiffs are entitled to the protections of Ala. Code § 10A-17-1.07.

B. Federal Preemption

The Defendants also assert that the federal Communications Decency Act of 1996 ("the CDA") shields them from any liability for most of the online postings. The CDA states, in relevant part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA also contains an express preemption provision, providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

"Although '[p]reemption under the Communications Decency Act is an affirmative defense, ... it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint.' " *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (per curiam) (quoting *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)). Here, CDA preemption is not readily applicable from the face of the Amended Complaint.

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.... Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.... **None of this means, of course, that the original culpable party who**

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amended, and where no part of income or profit is distributable to its members, directors and officers.").

> **posts defamatory messages would escape accountability**.... Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997). In short, **a plaintiff defamed on the internet can sue the original speaker**, but typically "cannot sue the messenger." *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.,* 519 F.3d 666, 672 (7th Cir. 2008).

Ricci, 781 F.3d at 28 (emphasis added).

Here, members of Black Belt are alleged to be the "original speakers" of the alleged defamatory comments, not simply "the messengers."

C. First Amendment Protections

" 'Whether a communication is reasonably capable of a defamatory meaning is a question of law.' " *Butler v. Town of Argo*, 871 So. 2d 1, 19 (Ala. 2003) (quoting *Kelly v. Arrington*, 624 So. 2d 546, 548 (Ala. 1993) (per curiam)). *Accord U.S. Steel,* 261 F.3d at 1293.

> A statement is defamatory if it "tends ... to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Blevins*[*v. W.F. Barnes Corp.*], 768 So. 2d [386,] 389-90[(Ala. Civ. App. 1999)] (internal quotations omitted) (citing *Harris*[*v. School Annual Publ'g Co.*], 466 So. 2d [963,] 964[(Ala. 1985)]). When analyzing an allegedly defamatory statement, a court must give the statement's language the "meaning that would be ascribed to the language by a reader or listener of average or ordinary intelligence, or by a common mind." *Id.* at 390 (internal quotations omitted) (citing *Camp v. Yeager,* 601 So. 2d 924, 927 (Ala. 1992)); *see also Labor Review Publ'g Co. v. Galliher,* 153 Ala. 364, 45 So. 188, 190 (1907). Furthermore, the "alleged defamatory matter must be construed in connection with other parts of the conversation or publication, and the circumstances of its publication ...." *Marion v. Davis,* 217 Ala. 16, 114 So. 357, 359 (1927); *see also Drill*

> *Parts*[*& Serv. Co. v. Joy Mfg. Co.*], 619 So. 2d [1280,] 1289[(Ala. 1993)].

U.S. Steel, 261 F.3d at 1293. "If the published statements are true, there is no actionable cause for libel." *Deutcsh v. Birmingham Post Co.*, 603 So. 2d 910, 911 (Ala. 1992) (per curiam).

> Equally well established is the rule that once a plaintiff has alleged that the statement defamed him in a certain manner, the plaintiff is thereafter bound by that construction of the statement. *See Smith Bros. & Co. v. W.C. Agee & Co.,* 178 Ala. 627, 59 So. 647, 648 (1912) (citing *Gaither v. Advertiser Co.,* 102 Ala. 458, 14 So. 788 (1894)); *Labor Review,* 45 So. at 190.

Id. *Accord Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) ("In assessing Horsley's claim, it is important to bear in mind that Horsley's theory of defamation is that Rivera's comments 'accused [him] of a felony,' and that to falsely accuse him of being such a felon holds him up to 'contempt, hatred, scorn, and ridicule in the eyes of the public and discredits [him] in the eyes of most law-abiding citizens.' Having alleged that Rivera defamed him by stating that he is chargeable with a felony, Horsley is bound by that construction of Rivera's statements." (citing *U.S. Steel*, 261 F.3d at 1293)). Here, the Plaintiffs allege that the Defendants' statements have defamed them in their business practices by "portraying Arrowhead Landfill as a facility that is a corrupt, intentional polluter of the Uniontown community that also desecrates cemeteries and is intentionally preying on that community to the extent that it calls to mind slavery times and false imprisonment…" (Doc. 10 at 12, ¶ 35).

The First Amendment places constitutional limits on the application of the state law of defamation. *See Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("[T]he Free Speech Clause of the First Amendment—'Congress shall make no law ... abridging the freedom of speech'—can serve as a defense in state tort suits…"). "The First Amendment can provide protection against state law defamation claims on two bases: (1) the *type* of speech involved and (2) the *person* whom the speech concerns and the *culpability* of the speaker … The inquiry associated with each has developed under two separate lines of Supreme Court cases." *Bennett v. Hendrix*, 325 F. App'x 727, 741 n.7 (11th Cir. 2009) (unpublished) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

1. Type of Speech

> "[S]peech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758–759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)) … Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers,* 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (internal quotation marks omitted).
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> …
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> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, *supra,* at 146, 103 S. Ct. 1684, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego*[*v. Roe*], [543 U.S. 77,] 83–84, 125 S. Ct. 521[(2004) (*per curiam*)]. See *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492–494, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Time, Inc. v. Hill,* 385 U.S. 374, 387–388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question

> whether it deals with a matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987).

Phelps, 562 U.S. at 451–53.

> The First Amendment protections that apply in defamation claims are rooted in the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Consistent with this principle, both the Supreme Court and [the Eleventh Circuit] have long recognized that a defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of "fact." *See, e.g., Letter Carriers v. Austin,* 418 U.S. 264, 284–86, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (publication of pejorative definition of scab was not actionable in that use of words like "traitor" could not be construed as representations of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler,* 398 U.S. 6, 13–14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (use of the term "blackmail," in characterizing negotiating position of a public figure who was seeking zoning variances while a city was attempting to acquire another tract from him, was not "slander" when spoken in heated public meetings of city council or "libel" when reported in newspaper articles, inasmuch as it was impossible to believe that a listener or reader would think that a crime had been charged); *Keller v. Miami Herald Publishing Co.,* 778 F.2d 711, 717 (11th Cir. 1985) (newspaper's editorial cartoon depicting persons resembling gangsters in a dilapidated building identified as a nursing home that had been closed by state order, and containing caption "Don't worry, Boss. We Can Always Reopen It As A Haunted House," was an expression of pure opinion and thus protected by the First Amendment).
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> [T]he Supreme Court has clarified that the Constitution provides protection for "rhetorical hyperbole" that "cannot reasonably be interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (citing *Hustler Magazine v. Falwell,* 485 U.S. 46, 50, 53–55, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1987)). This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. *Id.* This protection reflects "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Levinsky's, Inc. v. Wal–Mart Stores, Inc.,* 127 F.3d 122, 128 (1st Cir. 1997). [The Eleventh Circuit] has applied the rule articulated in *Milkovich* to find that a statement made by outside

> counsel representing a steel company that the conduct of an equipment vendor, in filing an ethics complaint regarding an allegedly illegal investigation by the state attorney general's office and the steel company, was "the equivalent of Jeffrey Dahmer complaining his victims got blood on the carpet," could not reasonably be construed as defamatory in the sense that the vendor and its principal were comparable in some fashion to a convicted mass murder. *See Tieco,* 261 F.3d at 1293–94 (11th Cir. 2001).
>
> In determining whether [a defendant]'s statement is entitled to protection as rhetorical hyperbole, [the court] must consider the circumstances in which the statement was expressed. *Keller,* 778 F.2d at 717.

Horsley, 292 F.3d at 701–02 ("Examining the context surrounding the statement[by reporter that anti-abortion activist was 'an accomplice to homicide,'] we conclude that it consisted of the sort of loose, figurative language that no reasonable person would believe presented facts. A reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability for Dr. Slepian's death, not as a literal assertion that Horsley had, by his actions, committed a felony."). *Accord Finebaum v. Coulter*, 854 So. 2d 1120, 1125-26 (Ala. 2003) ("The First Amendment []protects mere rhetorical hyperbole or statements that cannot reasonably be interpreted as representing actual facts."). "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will [also] receive full constitutional protection." *Milkovich*, 497 U.S. at 20 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)); *Deutcsh v. Birmingham Post Co.*, 603 So. 2d 910, 912 (Ala. 1992). "One cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, nondefamatory facts, no matter how

derogatory the expression may be. This is so because the recipient of the information is free to accept or reject the opinion, based on his or her independent evaluation of the disclosed, nondefamatory facts." *Sanders v. Smitherman*, 776 So. 2d 68, 74 (Ala. 2000) (per curiam) (citation omitted).

On the other hand, "[f]alse factual assertions are not protected under the First Amendment…" *Bennett*, 325 F. App'x at 741 (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting *New York Times Co.,* 376 U.S. at 270))). "The dispositive question is []whether a reasonable factfinder could conclude the challenged statements imply an assertion that 'is sufficiently factual to be susceptible of being proved true or false.' " *Id.* at 739 (quoting *Milkovich*, 497 U.S. at 21). "[T]he tone of the speech and its medium of expression can often signal opinion or nonliteral assertions of fact …" *Id.* at 741 (citing *Milkovich,* 497 U.S. at 6 (noting "the general tenor of an article" may negate a literal assertion); *Secrist v. Harkin,* 874 F.2d 1244, 1249 (8th Cir. 1989) (noting a campaign press release "is at least as likely to signal political opinion as a newspaper editorial or political cartoon")).

The allegedly defamatory speech addresses issues of environmental justice, which is clearly a matter of public concern. Though the Plaintiffs protest that they simply "own[] a landfill" and "ha[ve] played no role in this controversy" (Doc. 32 at 19, 23), the environmental and socio-economic politics surrounding the location and

operation of waste disposal sites have been matters of public debate long before the Plaintiffs took over operation of the Landfill.[9] Moreover, given its self-explanatory

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[9] *See, e.g.*, Kathleen Bonner, *Toxins Targeted at Minorities: The Racist Undertones of "Environmentally-Friendly" Initiatives*, 23 Vill. Envtl. L.J. 89, 90 (2012) ("Environmental racism gained national attention in the mid-1980s after the United States Government Accountability Office (GAO) and the United Church of Christ explored the issue in two influential studies. Each study concluded that owners of hazardous waste sites are more likely to build next to communities with a dense minority population than non-minority populations. Specifically, the United Church of Christ study explicitly connected race with an increased likelihood of exposure to hazardous wastes." (footnote omitted)); Patrick Field et. al., *Risk and Justice: Rethinking the Concept of Compensation*, 545 Annals Am. Acad. Pol. & Soc. Sci. 156, 157 (1996) ("America is having a difficult time siting much-needed waste disposal facilities for toxic materials ranging from used motor oil, to industrial solvents, to biomedical waste … The United States is even having trouble siting power plants, sewage treatment plants, and far less risky sanitary landfills. Industry spokespeople, and the critics of a selfish public unwilling to shoulder its responsibilities, have blamed the 'not in my backyard' (NIMBY) phenomenon on affluent, white, suburban residents unwilling to share the burdens of their wasteful habits."); Michael B. Gerrard, *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495, 495–96 (1994) ("Many leading voices in the environmental justice movement believe that minority communities are victims of NIMBY. For example, Professor Robert D. Bullard has written that 'the cumulative effect of not-in-my-backyard (NIMBY) victories by environmentalists appears to have driven the unwanted facilities toward the more vulnerable groups. Black neighborhoods are especially vulnerable to the penetration of unwanted land uses . . . . NIMBY, like white racism, creates and perpetuates privileges for whites at the expense of people of color.' NIMBY, in its various forms, has three principal types of targets[, one of which] is waste disposal facilities, primarily landfills and incinerators."); Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001, 1001–03 (1993) ("Policy makers and local land use officials have long struggled to cope with the 'not in my backyard' (NIMBY) syndrome in attempting to site 'locally undesirable land uses' (LULUs), such as homeless shelters, drug or alcohol treatment centers, and **waste disposal facilities**. In general, LULUs are considered beneficial to society at large, and many agree that they should be located somewhere. Those same citizens protest vigorously, however, when such a use is sited near their homes. This protest is quite rational. The benefits that LULUs produce typically are diffused throughout society, while their costs and risks are concentrated on a relatively small group of neighbors. No one wants to be one of the unlucky folks forced to bear those costs. Because local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance-- choosing sites in neighborhoods that are least likely to protest effectively. Not surprisingly, many of the neighborhoods selected are populated disproportionately by the poor and by people of color. Indeed, many representatives of low income and predominantly African American, Latino, or other minority neighborhoods charge that industry and governmental siting officials have adopted a PIBBY—'put it in blacks' backyards'--strategy for siting LULUs." (emphasis added) (footnotes omitted)).

name Black Belt Citizens Fighting for Health and Justice, its publicly stated goal of "getting rid of the Arrowhead Landfill," and the overall tone of its online statements, viewed collectively rather than in isolation, a reasonable person would hardly expect Black Belt's views on the Landfill to be unbiased.[10]

Providing further context for the alleged defamatory speech, the Amended Complaint acknowledges that the Landfill is used as a repository for coal ash released in the 2008 Kingston spill. The "Administrative Order and Agreement on Consent" between the TVA and EPA, which ultimately led to the ash material being deposited at the Landfill and which the Plaintiffs have attached to their pleading, recognizes that coal ash is potentially hazardous to the environment and human health.[11] Highlighting the public nature of these issues, Black Belt has not limited its ire over the Landfill to the private Plaintiffs, instead also taking government agencies, the EPA and ADEM, to task for perceived lax oversight and indifference to its members' plight.

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[10] *Cf. Bently Reserve L.P. v. Papaliolios*, 218 Cal. App. 4th 418, 431 (2013) ("Internet posts where the 'tone and content is serious,' where the poster represents himself as 'unbiased' and 'having specialized knowledge,' or where the poster claims his posts are 'Research Reports' or 'bulletins' or alerts,' may indeed be reasonably perceived as containing actionable assertions of fact."); *Bennett*, 325 F. App'x at 742 ("[T]he front page of Plaintiffs' Exhibit 2 is not styled as a cartoon, parody, or editorial, and its tone is not satirical or exaggerated. Rather, it involves an assertion by an [sic] law enforcement officer regarding the criminal history of one of his opponent's supporters, accompanied by a mug shot of that supporter. The tone of the flier supports our conclusion that it is not protected by the First Amendment.").

[11] *See* (Doc. 10 at 24 ("[I]f the ash material is not properly managed and remediated, the direct impact of the ash material currently in the water on the riverine ecosystem, further suspension of the ash and its constituents within affected waters, and potential exposure from ash on the ground could present unacceptable impacts to human health and/or the environment … Ash at the Site contains constituents such as arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium and zinc which are 'hazardous substances' as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).").

Against this backdrop, as established by the Amended Complaint's well-pleaded allegation, the undersigned concludes that most of the statements at issue, assuming they are defamatory under Alabama law,[12] are nonetheless protected by the First Amendment as statements of opinion and/or rhetorical hyperbole concerning a matter of public interest. The undersigned finds that only the following challenged statements are sufficiently factual to be susceptible of being proved true or false:

- The statement on Black Belt's website that "deliberate discharges from the landfill reveal high levels of arsenic."
- The statement from the November 2, 2015 Facebook post that "Arrowhead Landfill, continue to leak toxins into rivers, streams, and groundwater."
- The statement made by Eaton at the December 4, 2015 new conference, and repeated in the December 5, 2015 Facebook post, that "toxic material from the coal ash [is] leaking into creeks and contaminating the environment."
- The statement from the January 11, 2016 Facebook post that "[t]his landfill is experiencing unpermitted amounts of water runoff leaving its site and entering neighboring property."
- The statement from the March 1, 2016 Facebook post that the Landfill experiences "the constant run-off of contaminated water."

[12] Given that the Plaintiffs admit to storing coal ash, a hazardous substance, at the Landfill, the undersigned concludes that the Defendants' repeated references to the Landfill as "toxic" are also un-actionable statements of truth.

2. Person whom the Speech Concerns

> Plaintiffs in defamation cases can be characterized as either: 1) public officials or public figures, 2) limited purpose public figures, or 3) private individuals. The Supreme Court has struck a "balance between the needs of the press and the individual's claim for wrongful injury" by establishing different tests for different defamation plaintiffs. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 343, 94 S. Ct. 2997, 3008–09, 41 L.Ed.2d 789 (1974). A limited purpose public figure is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351, 94 S. Ct. at 3013. Public figures "must prove that the defendant acted with actual malice to establish liability" when the "defamatory material involves issues of legitimate public concern." *Silvester v. American Broadcasting Co., Inc.* 839 F.2d 1491, 1493 (11th Cir. 1988). To show that [defendants] acted with "actual malice" by publishing defamatory material, [plaintiffs] must show that they acted "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686 (1964).

Little v. Breland, 93 F.3d 755, 756–57 (11th Cir. 1996). *See also Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 332-33 (Ala. 2007) (similar).

"Determining whether an individual is a public figure—and thus subject to the actual malice analysis—is a question of law for the court to decide." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016). *Accord Cottrell*, 975 So. 2d at 332 ("A court must determine as a matter of law a plaintiff's classification in the context of a defamation claim."). This Circuit has "adopted the three part test set forth in *Waldbaum v. Fairchild Publications, Inc.* 627 F.2d 1287 (D.C. Cir. 1980), to determine if the plaintiff is a limited purpose public figure. Under this analysis, [a court] must '(1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation [was] germane to the plaintiff's participation in the controversy.' " *Little*, 93 F.3d at

757 (quoting *Silvester v. Am. Broad. Cos., Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988)).[13] *See also Cottrell*, 975 So. 2d at 334 ("The three-pronged test applied in *Little* provides a workable means of determining whether a plaintiff in a defamation action is a limited-purpose public figure because of his role in a public controversy; this Court adopts it...").

> Under the first prong of the *Waldbaum* test, a public controversy must be more than merely newsworthy. [*Waldbaum*, 627 F.2d] at 1296; *Wolston v. Readers Digest Association, Inc.,* 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979) ("The private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."). In addition, the public controversy must not be an essentially private concern such as divorce. *Time, Inc. v. Firestone,* 424 U.S. 448, 454-55, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154 (1976). If it is evident that resolution of the controversy will affect people who do not directly participate in it, the controversy is more than merely newsworthy and is of legitimate public concern. *Waldbaum,* 627 F.2d at 1296. In short, as the court stated in *Waldbaum,* "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." *Id.* at 1297.

Silvester, 839 F.2d at 1494–95. Moreover, "[t]he public controversy must have preexisted the alleged defamation." *Little*, 93 F.3d at 757 (citing *Silvester*, 839 F.2d at 1495). "To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can

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[13] The three-part *Waldbaum* test remains the applicable standard for determining limited-purpose public figures in the D.C. Circuit. *See Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 585 (D.C. Cir. May 10, 2016) ("Whether Zepter is a limited-purpose public figure or is a private figure is a matter of law for the court to decide. Although *Gertz* ultimately controls the resolution of this question of law, this court employs a three-part inquiry first articulated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296–98 (D.C. Cir. 1980)." (citations and quotation omitted)).

see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." *Waldbaum*, 627 F.2d at 1297 (citation and footnote omitted).[14]

Considering the allegations in the Amended Complaint, it is evident that the controversies in this case are the environmental, public health, and social impacts on the Perry County community from the Plaintiffs' operation of the Landfill, particularly its acceptance and storage of coal ash from the Kingston spill. These controversies preexisted the alleged defamatory statements, and "it is evident that resolution of the[se] controvers[ies] will affect people who do not directly participate in" them; thus, they are "more than merely newsworthy and [are] of legitimate public concern." *Silvester*, 839 F.2d at 1494–95.

Of particular note, the allegations in the Amended Complaint readily show that the Plaintiffs' operation of the Landfill, particularly in its use as a repository for hazardous material, is heavily regulated at both the state (i.e., ADEM) and federal (i.e., EPA) level. The Eleventh Circuit has recognized that "the public has a marked interest in a controversy that involves alleged violations of important state regulations." *Id.* at 1495. In reaching this determination, *Silvester* cited favorably to *Reliance Insurance Co. v. Barrons,* 442 F. Supp. 1341, 1348-49 (S.D.N.Y. 1977),

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[14] *Waldbaum* believed it unnecessary "to state that a court should define the controversy 'narrowly' or 'broadly,' " reasoning that a "narrow controversy will have fewer participants overall and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact. Indeed, a narrow controversy may be a phase of another, broader one, and a person playing a major role in the 'subcontroversy' may have little influence on the larger questions or on other subcontroversies. In such an instance, the plaintiff would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases." 627 F.2d at 1297 n.27.

noting that "one factor supporting [the *Reliance Insurance*] court's conclusion that plaintiff insurance company was a public figure was that plaintiff was subject to close state regulation." 839 F.2d at 1495. Similarly, the *Silvester* court found that the "highly regulated nature" of the American jai alai industry underscored "[t]he public nature of the controversy" at issue in that case, noting:

> Extensive state regulation of jai alai exists in all states in which the sport is played. The primary purpose of the regulations is to supervise the gambling mechanism which is a crucial aspect of jai alai. In addition, the regulations ensure that the state receives its authorized share of gambling revenue…
>
> The potential loss of tax revenue because of corruption also is evidence that resolution of the controversy could affect many others besides the systems betters, players, and jai alai management and owners who are directly involved or participants in the controversy. Corruption in the industry also affects the hundreds of thousands of citizens who patronize jai alai frontons each year.

839 F.2d at 1495. Alabama courts have similarly held that a plaintiff's participation in a heavily regulated industry favors a determination that the plaintiff is a limited purpose public figure. *See Am. Ben. Life Ins. Co. v. McIntyre*, 375 So. 2d 239, 250 (Ala. 1979) (per curiam) ("Based on the guidelines set forth in *Hutchinson*[*v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979)], we find that American Benefit is a 'limited-purpose public figure.' The company was regulated by the State Insurance Commissioner. There is a public interest in such companies licensed by the state. By entering into such a business, a company has voluntarily subjected itself to public scrutiny."),[15] *disavowed on other grounds*,

[15] As the Defendants point out, the initial opinion in *American Benefit* held that insurance companies were general-purpose public figures, stating: "It cannot be successfully argued that a corporation whose dealings are subject to close regulation by our state government,

Pemberton v. Birmingham News Co., 482 So. 2d 257, 260 (Ala. 1985); *White v. Mobile Press Register, Inc.*, 514 So. 2d 902, 904 (Ala. 1987) (finding that the plaintiff showed "a voluntary decision to place himself in a situation where there was a likelihood of public controversy" where, *inter alia*, he chose "a career as a high level executive in [the hazardous waste transportation] industry that is the subject of much public interest"). [16] Accordingly, the undersigned finds that the first *Waldbaum* prong is satisfied as to the Plaintiffs.

> The second prong of the *Waldbaum* limited public figure analysis addresses the extent to which the plaintiffs are involved in the public controversy. It is clear that the plaintiffs must be more than tangential participants in the controversy. *Waldbaum,* 627 F.2d at 1297. To fulfill the second prong, the plaintiff either (1) must "purposely [try] to

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and, indeed, whose very existence as an entity is owing to that government, does not invite attention and comment from the news media. The insurance business has long been held to be clothed with the public interest, and the power and influence of such a business over society cannot be ignored." 375 So. 2d at 242 (citation omitted). However, in overruling a subsequent application for rehearing, the court extended its initial opinion to address several issues, which included the following: "Because of recent decisions of the United States Supreme Court, we … deem it advisable to discuss whether American Benefit Life was a 'public figure,' as a majority of this Court found it to be on original deliverance. In *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979), the Supreme Court held that a "libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.' " *Id.* at 249-50. After discussing the then-recent *Wolston* and *Hutchinson v. Proxmire* decision (both issued the same day), the *American Benefit* court determined that the party insurance company was a "limited-purpose public figure." *See id.* at 250. To the extent *American Benefit*'s opinion on rehearing did not supersede its initial holding that insurance companies are general-purpose public figures, it appears to have rendered that holding dicta at most. The undersigned has not found any Alabama appellate court opinion citing *American Benefit*'s "general-purpose public figures" initial holding.

[16] *But see, e.g.*, *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 & n.11 (4th Cir. 1989) ("We cannot accept the proposition, tacitly adopted in some jurisdictions, that a business enterprise loses much of the protection afforded by the traditional law of defamation simply as a result of being subject to pervasive governmental regulation.[] We do not believe that the existence of an ongoing public interest in the stability of society's financial institutions and markets, or in the supervision of the gaming industry, or in the regulation of utilities automatically elevates every member of the regulated class to public figure status." (disagreeing with *American Benefit* and *Reliance Insurance*, *inter alia*)).

> influence the outcome" of the public controversy, or (2) "could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Id.*

Silvester, 839 F.2d at 1496.

The Plaintiffs insist that they are simply "a landfill company insofar as this litigation is concerned" and have made not attempt to voluntarily become a part of the public controversies at issue here. Such assurances, however, are not dispositive.

> In general, public figures voluntarily put themselves into a position to influence the outcome of the controversy. *Gertz v. Robert Welch, Inc.,* 418 U.S. at 345, 94 S. Ct. at 3009. However, "occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has 'invited comment' relating to the issue at hand." *Waldbaum,* 627 F.2d at 1298. As the Former Fifth Circuit noted in *Rosanova v. Playboy Enterprises, Inc.,* 580 F.2d [859,] 861[(1978)], "[i]t is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, ... that '[defendant] voluntarily engaged in a course that was bound to invite attention and comment.' "

Id. *See also Cottrell*, 975 So. 2d at 340–41 ("A plaintiff is drawn into a public controversy when his actions invite comment and attention, despite the fact that the plaintiff does not actively try or even want to attract the public's attention. *See, e.g.*, *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (holding that Rosanova was a limited-purpose public figure because he consistently associated with underworld contacts and voluntarily engaged in a course of activity that was bound to invite attention and comment). Therefore, a person can be drawn into a public controversy based on his status, position, or association to the public controversy." (citations omitted))

As discussed previously, landfills and other waste disposal sites are subject to heavy government regulation and have long attracted public controversy. Relevant to this action, the Landfill has attracted particular controversy over its acceptance of coal ash from the Kingston spill, an event predating the Plaintiffs' ownership of the Landfill. The Plaintiffs "voluntarily engaged in a course that was bound to invite attention and comment" when they purchased the Landfill from its previous owners at a bankruptcy sale. *Cf. Silvester*, 839 F.2d at 1497 ("Plaintiffs initially thrust themselves into this position of prominence by voluntarily entering [the] strictly regulated, high-profile [jai alai] industry in which there were few major participants."); *Little*, 93 F.3d at 758 ("Even if Little did not voluntarily put himself in a position to influence the outcome of the controversy, he was caught up in the controversy against his will, and assumed a prominent position in its outcome. Little's choice to assume the position of leadership at the Mobile Convention & Visitors Corporation, an organization involving public scrutiny, shows a voluntary decision to place himself in a situation where there was a likelihood of public controversy ... Little voluntarily accepted a taxpayer-supported job to market the $60 million convention center and attract visitors to Mobile. His hiring, performance, and firing would all be the subject of public concern and debate." (citation and quotations omitted)). Accordingly, the undersigned finds that the second *Waldbaum* prong is satisfied as to the Plaintiffs. Finally, the undersigned easily concludes that the Defendants' alleged defamatory statements are germane to the Plaintiffs' participation in the controversy, thus satisfying the third

Waldbaum prong. *Cf. Silvester*, 839 F.2d at 1497 ("Finally, it is self-evident that the defamatory parts of the '20/20' broadcast were germane to the plaintiffs' participation in the controversy as is required under the third prong of the *Waldbaum* analysis. The primary concern of the '20/20' segment was the alleged corruption in the jai alai industry and the plaintiffs' role in it."). Thus, because the Plaintiffs are limited purpose public figures in this action,[17] they must allege sufficient facts plausibly showing that the Defendants published their defamatory statements with actual malice.

> To plead actual malice, [the Plaintiffs] must allege facts sufficient to give rise to a reasonable inference that the false statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan,* 376 U.S. at 280, 84 S. Ct. 710. The test is not an objective one and the beliefs or actions of a reasonable person are irrelevant. *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Rather, we ask whether the defendant, instead of acting in good faith, actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false. *Id.; Silvester v. Am. Broad. Cos.,* 839 F.2d 1491, 1493 (11th Cir. 1988) (citing *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)). The Supreme Court has written that this showing can be inferred in certain circumstances:
>
> > Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.
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> *St. Amant,* 390 U.S. at 732, 88 S. Ct. 1323.

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[17] In light of this determination, the undersigned declines to address the Defendants' alternative argument that the Plaintiffs are general public figures.

> Actual malice requires more than a departure from reasonable journalistic standards. *Levan v. Capital Cities/ABC, Inc.,* 190 F.3d 1230, 1239 (11th Cir. 1999). Thus, a failure to investigate, standing on its own, does not indicate the presence of actual malice. *Harte–Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 692, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). Rather there must be some showing that the defendant purposefully avoided further investigation with the intent to avoid the truth. *Id.*

Michel, 816 F.3d at 702–03 (citations to New York state law omitted).

Disregarding the Plaintiffs' conclusory assertions that the defamatory statements were made "with malice by intentional action or with reckless disregard for the truth" and "with the malicious intent or reckless disregard to publish such false statements despite knowing or having reason to know of their falsity" (Doc. 14 at 11 – 12, 14, ¶¶ 34, 40) – "[a]llegations [which] amount to little more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' which are insufficient to support a cause of action[,]" *Michel*, 816 F.3d at 704 (quoting *Iqbal*, 556 U.S. at 678) ("[W]e can disregard the portions of the complaint where Michel alleges in a purely conclusory manner that the defendants were "reckless" in publishing the article.") – the Amended Complaint does not allege facts plausibly indicating that any of the alleged defamatory statements was made with knowledge that it was false or with reckless disregard of whether it was false or not.[18]

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[18] In arguing that they have plausibly alleged actual malice, the Plaintiffs point to their allegations that the Defendants refused to remove the offending online posts or retract their statements after the Plaintiffs informed them of the alleged falsity of those statements. However, "a mere refusal to correct a publication falls short" of showing actual malice. *Klayman v. City Pages*, 650 F. App'x 744, 751 (11th Cir. 2016) (per curiam) (unpublished) (citing *New York Times Co.*, 376 U.S. at 286)). *Accord Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) ("The Supreme Court also has said that actual malice

In sum, most of the Defendants' alleged defamatory statements are protected by the First Amendment as opinion and/or rhetorical hyperbole concerning a matter of public interest. As for those few statements identified above as not enjoying such protection, the claims based on them are still due to be dismissed because the Plaintiffs, who are limited purpose public figures, have failed to plausibly allege that the statements were published with actual malice. Accordingly, the Defendants' motion to dismiss the First Amended Complaint under Rule 12(b)(6) (Doc. 15) is due to be **GRANTED**.

D. Leave to Amend

The Defendants have argued that the First Amended Complaint should be dismissed with prejudice without giving the Plaintiffs an opportunity to file a second amend complaint that might save some or all of their claims from dismissal. Moreover, a "district court is not required to grant a plaintiff leave to amend his complaint sua sponte[prior to granting dismissal under Rule 12(b)(6)] when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc). At most, the Plaintiffs have requested, in a footnote at the end of their response brief, that they be given another opportunity to plausibly allege actual malice. (Doc. 32 at 24 n.20

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cannot be inferred from a publisher's failure to retract a statement once it learns it to be false. *New York Times*, 376 U.S. at 286 … Thus the fact that Pippen alerted the defendants by email after publication that he had not entered bankruptcy does not help him establish actual malice at the time of publication."). The undersigned also disagrees that the Defendants' eventual removal of the offending online statements plausibly demonstrates, as the Plaintiffs claim, "their acknowledgement of the libelous nature of their statements and the fact that they had simply purposefully avoided the truth to that point." (Doc. 32 at 16).

(citing *Michel*, 816 F.3d at 706 ("A dismissal based on the failure to plead facts giving rise to an inference of actual malice should be without prejudice and the plaintiff should have the opportunity to amend his complaint.")).[19] The undersigned finds that this request is due to be **GRANTED**.[20] As discussed above, however, even if actual malice could be successfully alleged, most of the alleged defamatory statements are still otherwise protected by the First Amendment and cannot support a claim for defamation. Thus, the undersigned finds that dismissal with prejudice of the Plaintiffs' claims is appropriate to the extent they are based on those otherwise protected statements.

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[19] To the extent the Plaintiffs' suggestion that "any dismissal should be without prejudice with leave to amend" constitutes a blanket request for leave amend, such a request is insufficiently raised, and should be **DENIED**, as to any issue other than actual malice. *See Davidson v. Maraj*, 609 F. App'x 994, 1002 (11th Cir. 2015) (per curiam) (unpublished) ("It has long been established in this Circuit that a district court does not abuse its discretion by denying a general and cursory request for leave to amend contained in an opposition brief." (citing *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009); *Wagner*, 314 F.3d at 542; and *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (per curiam) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1208 (11th Cir. 2012) (per curiam) ("The Fund's request for leave to amend appeared in its response to the Defendants' motion to dismiss. The Fund failed, however, to attach a copy of this proposed amendment or set forth its substance. Therefore, the district court did not err by denying the Fund's request.").

[20] The undersigned disagrees with the Defendants' assertion that further leave to amend should be denied because the Plaintiffs "failed to avail themselves of a previous opportunity to amend." (Doc. 34 at 18). The undersigned had previously ordered the Plaintiffs to amend their complaint solely to correct deficiencies in their allegations supporting subject matter jurisdiction, which the Plaintiffs did in the First Amended Complaint. While the Plaintiffs certainly could have filed a second amended complaint "as a matter of course" in an attempt to address some or all of the issues raised in the Defendants' motion to dismiss rather than litigate the merits of the motion, *see* Fed. R. Civ. P. 15(a)(1)(B), the Plaintiffs have cited no authority, nor is the undersigned aware of any, that holds a plaintiff's failure to do so forfeits any opportunity to later request amendment to avoid a Rule 12(b)(6) dismissal with prejudice.

IV. Conclusion and Recommendations

In accordance with the foregoing analysis, it is **RECOMMENDED** that the Defendants' motion to dismiss the First Amended Complaint under Rule 12(b)(6) (Doc. 15) be **GRANTED** as follows:

1. The Plaintiffs claims for libel and slander based on the specific statements listed below should be **DISMISSED without prejudice**:

- The statement on Black Belt's website that "deliberate discharges from the landfill reveal high levels of arsenic."
- The statement from the November 2, 2015 Facebook post that "Arrowhead Landfill, continue to leak toxins into rivers, streams, and groundwater."
- The statement made by Eaton at the December 4, 2015 new conference, and repeated in the December 5, 2015 Facebook post, that "toxic material from the coal ash [is] leaking into creeks and contaminating the environment."
- The statement from the January 11, 2016 Facebook post that "[t]his landfill is experiencing unpermitted amounts of water runoff leaving its site and entering neighboring property."
- The statement from the March 1, 2016 Facebook post that the Landfill experiences "the constant run-off of contaminated water."

2. The Plaintiffs claims for libel and slander based on all other alleged defamatory statements should be **DISMISSED with prejudice**.

3. The Plaintiffs should be granted leave to file, by a date certain, a second amended complaint solely for the purpose of alleging facts sufficient to plausibly show actual malice to support the claims for libel and slander that are dismissed **without** prejudice. The second amended complaint should omit mention of all statements that form the basis of defamation claims that are dismissed **with** prejudice.

4. If the Plaintiffs decline to file a second amended complaint as set forth above, then the Court should enter final judgment under Federal Rule of Civil Procedure 58 dismissing all claims **with prejudice**.

V. Notice of Right to File Objections

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P 72(b); S.D. Ala. GenLR 72(c). The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests

of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 13th day of October 2016.

/s/ Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE